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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EUSEBIO YSAGUIRRE,

Defendant and Appellant.

B207826

(Los Angeles County
Super. Ct. No. VA102931)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Philip Hickok, Judge. Judgment affirmed; sentence vacated and remanded for
resentencing with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela Hamanaka, Assistant Attorney General, Victoria B. Wilson
and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Three incidents of child molestation resulted in a defendant being charged with four felony counts, each punishable by a sentence of 15-years-to-life in prison. A prior conviction charged as both a “strike” and a five-year enhancement was found true. The sentencing court, indicating its belief that consecutive sentences were statutorily mandated on all counts, imposed a 125-year-to-life sentence. The sentence consisted of four doubled, indeterminate terms, plus a single five-year enhancement for the prior conviction. We order a new sentencing hearing to address two issues. Consecutive sentences were mandatory on only three of the four counts, and the five-year enhancement should have been imposed on each of the four counts, rather than just once.

PROCEDURAL HISTORY

Eusebio Ysaguirre (appellant) appeals from a judgment entered following his conviction by jury of two counts of sexual penetration of a child under 10 years of age (Pen. Code, § 288.7, subd. (b) (§ 288.7(b)) and two counts of child molestation (Pen. Code, § 288, subd. (a); (§ 288(a)).¹ As to each of the child molestations (counts 3 & 4) the jury found a multiple victim allegation (§ 667.61, subd. (b)) to be true. A defense motion under section 1118.1 was granted as to a fifth count. Following a jury waiver, the court found four prior conviction allegations to be true, including one “strike,” a residential burglary. (§§ 667, subd. (a); 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

The total sentence, 125 years to life, consisted of consecutive 15 years-to-life terms for each of the four counts, doubled as a result of the strike prior, plus five years for the burglary prior pursuant to section 667, subdivision (a). Additional prior conviction findings were stricken and appellant received total confinement credits of 230 days. Comments by the court and counsel at the sentencing hearing made it clear that all involved believed consecutive sentencing was mandatory as to all four counts.

Ysaguirre filed a timely notice of appeal and we appointed counsel. On September 12, 2008, counsel filed an opening brief raising no issues. On September 15,

¹ All statutory references are to the Penal Code.

2008, the clerk of this court notified Ysaguirre by letter that he had 30 days to submit any contentions or arguments. Appellant has not responded.

This court sought supplemental letter briefing from counsel on the issue of whether consecutive sentences were mandatory, and we have considered the responses of the parties. We have also independently reviewed the record and are satisfied that there are no arguable issues, other than as discussed below. (*People v. Wende* (1979) 25 Cal.3d 436; *People v. Kelly* (2006) 40 Cal.4th 106.)

STATEMENT OF FACTS

In August 2007, appellant was living in his car at the residence of his daughter-in-law and her family. Appellant molested his 10-year-old granddaughter (count 4) and a seven-year-old girl who lived across the street from his granddaughter (counts 1-3). The children, who were not close friends, both testified in detail about the crimes. Corroborating evidence included their independent, tearful “fresh complaints” to their parents and testimony by a forensic nurse practitioner who interviewed and examined the neighbor-victim. The evidence also showed appellant failed to deny wrongdoing and fled the neighborhood without explanation when a member of his family confronted appellant and asked what was going on with his granddaughter. The defense called no witnesses.

Appellant victimized his seven-year-old neighbor three times during two separate incidents on the same day in August of 2007. Count 1, charged as a violation of section 288.7(b), occurred when appellant placed his finger in the child’s vagina after enticing her into his van by promising her a kite. After the child left the van with the kite, returned home, and came back outside, appellant led her by the hand into a shed behind the residence at which his van was parked. There appellant digitally penetrated the child a second time, resulting in count 2, a second charged violation of section 288.7(b). On the same occasion in the shed, appellant exposed himself, touched the child with his penis multiple times and stroked the child’s buttock with his hand, resulting in count 3, a charged violation of section 288(a).

About a week later, appellant was driving a car when his granddaughter, a front seat passenger, complained about a sore shoulder. Appellant told her he would massage it and squeezed her shoulder. He then put his hand inside her tank top and squeezed her breast, which was charged as count 4, a violation of section 288(a).

Discussion

I. Consecutive Sentencing

We first consider whether the trial court properly concluded that consecutive sentences were mandatory as to all counts in the present case.

A. Proceedings below

As noted, the trial court sentenced Ysaguirre to consecutive 15years-to-life terms for each of the four counts – in counts one and two, for each of two counts of sexual penetration in violation of section 288.7(b); in counts three and four, for each of two counts of child molestation in violation of 288(a). The court then doubled the 60 year term pursuant to the “Three Strikes” law and added a single five-year term for the burglary prior, which had been alleged pursuant to section 667, subdivision (a).

The record reflects the trial court imposed sentence believing that consecutive terms were statutorily mandated. The court stated:

“... Mr. Ysaguirre, then it will now be the judgment and sentence of this court that for a violation of Penal Code section 288.7 (b), in count 1, with regard to Samantha, you be imprisoned in the state prison for the term prescribed by law, which is 15 years – to-life.

“Count 2 is another 288.7 (b) charge against Samantha, [and] the law requires a second separate 15 years –to-life in prison.

“Count 3 is a 288 (a) with regards to Samantha, the law gives – but for multiple victims this would have been a 3, 6, or 8 years sentencing range. Because Maria was also involved in these on different occasions, the law under Penal Code section 667.61(b) requires a sentence of 15 years-to-life on count 3.

“Likewise on Count 4, the 288 (a) on Maria, because multiple victims was found to be true, the law requires an additional 15 years-to-life.

“Each of these has to run consecutive to one another. That’s the statutory mandate the legislature has spoken. That means this is a 60 years-to-life term.”

B. Effect of the Three Strikes law

There is no question that the court chose the appropriate term – 15-years-to life on each count. (See §§ 288.7(b); 667.61, subd. (b).) Further, when imposing sentence on indeterminate terms, the court must impose sentence either fully consecutive or fully concurrent. (*People v. Felix* (2000) 22 Cal.4th 651, 656.) However, the court cited no authority for its belief that consecutive sentencing was mandatory; the question is whether that belief was correct. As to all but count 3, we find that it was. As to count 3, we find that the trial court had discretion to sentence either consecutively or concurrently.

The Three Strikes law is clear -- if current multiple felonies in a prosecution involving one or more prior serious and/or violent offenses are *not* committed on the same occasion and *do not* arise from the same set of operative facts, consecutive sentencing is mandatory. (*People v. Lawrence* (2000) 24 Cal.4th 219, 222-223 (*Lawrence*); *People v. Hendrix* (1997) 16 Cal.4th 508, 512 (*Hendrix*); *People v. Newsome* (1997) 57 Cal.App.4th 902, 910 (*Newsome*); see also §§ 667, subd. (c)(6); 1170.12, subd. (a)(6).) If multiple felonies in the current case *are* committed on the same occasion or *do* arise from the same set of operative facts, consecutive sentencing is discretionary. (*Hendrix, supra*, 16 Cal.4th at p. 512-513; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1140-1141.)

Stated another way, “[t]he law deprives the trial court of discretion and requires consecutive sentencing only if the current crimes arose on different occasions and out of different sets of operative facts. It is of no import that the record fails to reveal whether or not the offenses occurred ‘on the same occasion’ if the evidence supports the court’s determination that the offenses arose ‘from the same set of operative facts.’ For the same reason, if the offenses occurred ‘on the same occasion,’ it does not matter whether there is evidence that they did or did not arise ‘from the same set of operative facts.’ Under

these circumstances, the court retains *discretion* under ordinary sentencing principles to decide whether to impose consecutive or concurrent terms.” (*People v. Hall* (1998) 67 Cal.App.4th 128, 137-138, emphasis original.)

The words “same occasion” have been defined to mean “at least a close temporal and spatial proximity between the acts underlying the current convictions.” (*People v. Deloza* (1998) 18 Cal.4th 585, 595.) Thus, a defendant who simultaneously robbed or attempted to rob four victims sitting at a single table committed crimes on the same occasion. (*Hendrix, supra*, 16 Cal.4th at pp. 510, 514; see also *Newsome, supra*, 7 Cal.App.4th at pp.906, 912 [home invasion robbery of four victims constituted both “same occasion” and “same set of operative facts” within the meaning of the Three Strikes law].) On the other hand, a defendant is not considered to commit crimes on the same occasion when he shoplifts, flees the store and then assaults and trespasses several minutes later in a place blocks away from the initial theft. (*Lawrence, supra*, 24 Cal.4th at p. 229.)

The words “same set of operative facts,” were defined in *Lawrence* to mean crimes “not sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted.” (*Lawrence, supra*, 24 Cal.4th at p. 233.) In practical application, the appellate court in *People v. Jones* (1998) 67 Cal.App.4th 724, 729, found the trial court properly sentenced the defendant to consecutive terms for burglary, forgery and intimidation of a witness for entering a residence, stealing a checkbook, later using one of the stolen checks to make a purchase and then, on four separate occasions, attempting to dissuade a witness from testifying against him at trial.

Applying these principles here, there can be no doubt that counts one, two, and four occurred on separate occasions and did not arise out of the same set of operative facts, thus mandating consecutive sentences. (See *People v. Lawrence, supra*, 24 Cal.4th at p. 229.) Count 1 occurred when appellant placed his finger in the seven-year-old neighbor’s vagina after enticing her into the van. Count 2, also a digital penetration, occurred later, after the victim returned home, came back outside and was lured into a

shed. As for count 4, it involved a wholly separate victim, appellant's granddaughter, and occurred about a week later.

The closer issue is whether a mandatory consecutive sentence was required on count 3, the additional lewd acts which occurred close to the same time as count 2, during the incident in the shed. We hold that the events in the shed constituted a single occasion within the meaning of the Three Strikes law. The victim's testimony clearly indicated the additional acts (count 3) took place in the shed, immediately after the digital penetration that was the basis for count 2. The shed, which had no windows and was primarily used for storage, was located about 30 feet from the back of the house. Thus, the record clearly indicates the acts perpetrated against appellant's neighbor in the shed shared a "close temporal and spatial proximity." (*People v. Deloza*, *supra*, 18 Cal.4th at p. 595.)

Accordingly, the imposition of a consecutive sentence on count 3 was permissible but not mandatory pursuant to the Three Strikes law. Because we cannot discern from this record whether the trial court would have chosen to impose consecutive sentences if it knew it had the discretion to do so, we must remand the case to the trial court for this limited determination unless another statute mandates a consecutive sentence on that count. (*Newsome*, *supra*, 57 Cal.App.4th at p. 913.)

We will briefly explain why other statutes which mandate consecutive sentences for certain sexual assault offenses are inapplicable to count 3 in the present case.

C. Penal Code section 667.6

Section 667.6, first enacted in 1979 and amended several times, includes subdivision (d), which requires "[a] full, separate, and consecutive term" for each violation listed in subdivision (e) of the same statute, "if the crimes involve separate victims or involve the same victim on separate occasions." Subdivision (e), in turn, contains a list of offenses which includes section 288, subdivision (b) (forcible child molestation) but not section 288(a). It is readily apparent that section 667.6 does not mandate a consecutive sentence on count 3 in the instant case, which, as noted, was a violation of section 288(a).

D. Penal Code section 667.61, the “One Strike” law

As mentioned above, the jury returned a finding as to the violations of 288(a) (counts 3 and 4) that the charges involved multiple victims within the meaning of section 667.61, subdivision (b). That subdivision, in conjunction with other parts of the same statute, known as the “One Strike” law, provides for a 15-year-to-life term where sentencing for violations of section 288(a) involving separate victims takes place at the same time.² Thus, the trial court correctly concluded that both counts 3 and 4 were punishable by a 15-year-to-life term. (*People v. DeSimone* (1998) 62 Cal.App.4th 693, 696.) However, section 667.61 does not mandate that those terms be imposed consecutively. Although a mandatory consecutive provision was recently added to the One Strike statute by an Initiative Measure (Proposition 83, section 12, effective on November 8, 2006), it does not apply to violations of section 288(a).³

E. Resentencing is required

Although no statement of reasons is required for the imposition of consecutive indeterminate sentences (*People v. Black* (2005) 35 Cal.4th 1238, 1262, fn. 17), it was error for the trial court to impose a consecutive sentence on count 3 under the impression it had no discretion to do otherwise. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.

² Subdivision (b) of section 667.61 sets the term at 15-to-life for offenses listed in subdivision (c), when committed under one of the circumstances specified in subdivision (e). Subdivision (c) includes violations of section 288(a). Subdivision (e) (5), in turn, reads: “The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.”

³ Effective November 8, 2006, subdivision (i) was added to section 667.61, providing that: “For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in Section 667.6.” The same legislative change renumbered subdivision (c) of section 667.61, which now includes section 288(a) as subdivision (c)(8). Since the mandatory consecutive provision only applies to subdivisions (c)(1) through (c)(7), it is inapplicable to violations of section 288(a).

8; *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383.) Resentencing is required because we cannot determine from the record whether the court would have imposed the same sentence had it correctly understood its discretionary power.

II. The Prior Conviction Enhancements

In addition, the sentence is unauthorized in that it fails to include three additional five-year terms for the prior burglary conviction, pursuant to section 667, subdivision (a)(1). An unauthorized sentence can be raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Imposition of a five-year enhancement is required where a person has been convicted of a serious felony in the current case, and it has been alleged and proved that the person also suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The trial court is without discretion in the matter, as imposition of such term is mandatory. (See § 1385, subd. (b); *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.)

Further, determinate sentencing rules have no application to indeterminate sentencing computations. (*People v. Nguyen* (1999) 21 Cal.4th 197, 205; see also Couzens and Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2008), p. 8.15.) It follows that the five-year term for a serious felony prior under 667, subdivision (a)(1) is to be imposed once as to *each* indeterminate term. (See *People v. Williams* (2004) 34 Cal.4th 397, 401-405 [serious felony enhancements apply to each count of a third strike sentence]; *People v. Misa* (2006) 140 Cal.App.4th 837, 847 [serious felony enhancement applied to indeterminate sentence for the crime of torture even though it was also imposed on a related determinate sentence; see also *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562 [“...*Williams* and *Misa* hold that in cases where multiple indeterminate terms are imposed, all section 667, subdivision (a) five-year serious felony enhancements must be imposed on every count”].) Here, the trial court should have

added a 667(a) five-year enhancement to each of the four 15-to-life terms. It shall do so on remand.

DISPOSITION

The judgment is affirmed and the sentence vacated. The cause is remanded to the trial court for resentencing. The trial court shall impose a five-year enhancement on each count, and shall exercise its discretion as to whether the sentence on count 3 shall be served concurrently or consecutively.

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O'NEILL, J.^{*}

We concur:

FLIER, Acting P. J.

BIGELOW, J.

*

Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.